

**SEMINAR NOTES RE
PARTY AND PARTY COST ASSESSMENT
IN THE LAND AND ENVIRONMENT COURT –
EVERYTHING YOU NEEDED TO KNOW BUT
WERE AFRAID TO ASK**

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The author of the paper does not accept any liability for anything contained in the paper and does not warrant the accuracy of the contents.

The purpose of this paper is to make legal practitioners aware of how the Cost Assessment process works and inform them of certain principles.

This paper is not intended to be a comprehensive study of the Legal Profession Act or the Cost Assessment process. Where an opinion is expressed it is the personal opinion of the author and is expressed without the benefit of comprehensive argument or detailed consideration of such arguments and accordingly none of the contents of this document should be relied on as a precedent or in any legal argument in relation to any matter that is considered by the author in his role as a Cost Assessor of the Supreme Court. In other words in his decision making capacity as a Cost Assessor the author is not bound by any of the opinions expressed in this document.

**SEMINAR NOTES
RE PARTY AND PARTY COST ASSESSMENT
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HISTORY

In 1994 changes were made to the Legal Profession Act 1987 with a view to deregulating the process by which costs were previously set and reviewed in NSW. This process has gone through evolutionary change resulting in the Legal Profession Act 2004.

The 1994 Act introduced a new system of cost disclosure and cost agreements with penalties to practitioners who did not disclose matters that were required to be disclosed. These provisions have been strengthened and extended, including some provisions that practitioners consider difficult or impossible to comply with.

The penalties are both disciplinary, in that in some instances the failure to disclose may amount to professional misconduct and also economic in that if there is a failure to disclose, a practitioner cannot recover his fees from the client until the bill has been assessed and there is a further disincentive that the cost of the assessment process must be paid by the practitioner regardless of the outcome.

The regime encourages costs agreements and provided an incentive to practitioners to enter a costs agreement, the major incentive being that if a practitioner enters a valid costs agreement his entitlement to costs can in many instances be protected from attack by the assessment process.

The old system taxation whereby costs were assessed by various Courts and the Registrars of those Courts was abolished. The system of using various scales for various types of work was abolished and instead of this time consuming inexpensive and significantly bureaucratic process a new process called "assessment" was introduced. Anyone who recalls the old system when costs were assessed by a person who had never practised in the real world will agree the new system is better.

The 1994 Act changed the basis upon which costs were determined from, that which were "necessary or proper" under the taxation system to that which is "fair and reasonable" under the new system and this has been continued in the 2004 Act.

This criteria applies to both Party and Party costs and Solicitor and Client costs.

The stated purpose of the test was to enable a successful litigant who has the benefit of a cost order to recover the realistic market costs of the litigation.

THE ASSESSMENT PROCESS

Assessments are of four types:

- Practitioner/Client costs, ie costs between a legal practitioner and another legal practitioner, ie between a solicitor and a barrister; or
- Application by a law practitioner relating to costs by another law practitioner, ie solicitor/barrister assessment
- Solicitor/Client costs, ie costs between a legal practitioner and its client; or
- Party/Party costs, ie costs determined to be paid to a party by an order of a Court or a Tribunal of unspecified costs.

The provisions are generally set out in Sections 350 to 395 of Act. The Legal Profession Regulations set out in greater detail the process that applies.

Briefly the following statutory provisions should be noted:

- 1 Section 350 gives to the right to a client to make an application for assessment of a bill of costs;
- 2 Section 351 gives a right to a practitioner to require an assessment of a bill given by another practitioner. This process can be used by solicitors, for example to have their agent's costs assessed and their barrister's costs assessed.
- 3 Section 352 allows a practitioner to have his own bill assessed. The advantage of this is that on assessment a Certificate is given and that Certificate forms a valid Judgment which can be enforced immediately without further litigation. It can form an effective method of cost recovery, however, the practitioner using this method must ensure there has been full compliance with the disclosure provisions of the Legal Profession Act.
- 4 Section 353 deals with what was commonly known as Party and Party costs.
- 5 Section 354 sets out how an application for assessment is made.
- 6 Section 356 sets out who is to be notified and how they are to be notified about a bill being filed for assessment.
- 7 Section 357 gives the Manager of Cost Assessments the power to refer applications to Cost Assessors and revoke such referrals. This provision also requires a Cost Assessor to refuse an assessment if he or she has an interest in the assessment, ie a conflict of interest.
- 8 Section 358 sets out the authority of a Cost Assessor to require documents or further particulars, and you should note that a failure to provide a Cost Assessor with information requested may amount to professional misconduct and the Assessor also has the right to determine whether he will continue with the process in the absence of such information.
- 9 Section 359 gives the parties rights to make submissions and provides that an Assessor is not bound by the rules of evidence and also requires the Cost Assessor to determine whether or not disclosure has been made and whether or not there is a costs agreement and if so, what are its terms.
- 10 Section 364 sets out the criteria for assessment.
- 11 Section 365 allows a Cost Assessor to have regard to a cost agreement. The Cost Assessor cannot apply the terms of agreement in the assessment. Cost agreements are used by the Assessors to ensure that the indemnity principle is not breached, ie that a party is not claiming more for costs than it is liable to pay.

COSTS DISCLOSURE

Disclosure requirements

You will all be aware that of the disclosure requirements of Section 309 of the 2004 Act, especially the onerous requirements to disclose the costs of the other party if a cost order is made against the client. In my view it is almost impossible to do this accurately, as I cannot see how a practitioner could know what another practitioner will charge, as presumably the basis of charges will be sensitive commercial information that would not be known to the practitioner instructed by the client.

Protestations of the Law Society and the professions against this requirement has fallen on "deaf ears" and the simple fact is that we have to live with this onerous requirement. I understand that the Legal Services Commissioner has indicated that provided a genuine attempt (whatever that means) is made by the practitioner, the LSC will not consider a failure to accurately disclose the other sides' costs as unsatisfactory or professional misconduct. Practitioners are reminded of the provisions of Section 317 of the new Act, which provides that failure to comply is capable of being unsatisfactory professional conduct or professional misconduct.

The amendments brought in by the 2004 Act did, however, have a "silver lining" in Section 312, where disclosure is not required if the client is another legal practitioner, a public company or a subsidiary of a public company, a financial services licensee and importantly a Minister of the Crown or a government department or public authority (in my view this includes councils) or where the basis of calculating legal costs have been arrived at by way of a tender process. This will certainly help those practitioners who act for large companies or government departments who will no longer have to put up with the inconvenience of repeated disclosures each time they act on behalf of one of these companies or departments. There is further relief in the provision that there is no requirement for disclosure if a disclosure has been in the last twelve months and the client has agreed in writing to waive the right to disclosure. There is, however, a "sting in the tail" and that is that a principle of the law practice will need to have a system in place for documenting the decision that disclosure is "not warranted" each time a new matter is commenced (as required by Section 312(1)(b)(iii)).

Practitioners should be aware of the provisions of Section 316, which provides an ongoing obligation to disclose. It should be noted that this Section requires disclosure of any change in anything included in the disclosure. The change of personnel handling the matter has to be re-disclosed. In other words the requirement for re-disclosure is no longer limited to the circumstances where a change in the method of calculating fees is involved or change in the total amount that may be payable is involved. One can well envisage that if a practitioner finds that the other party has now engaged senior counsel a re-disclosure may be necessary in relation to the estimated costs of the other party.

The new disclosure requirements will impact in any practitioners' practise in the Land and Environment Court, especially (but not limited to) the following:

- The requirement in the old Act (Section 180) relieving a practice from the disclosure requirements where it may not be reasonable to do so has been removed;
- The client has right to progress reports, although he must pay for them;

- The need to disclose the estimated costs to the client of the other party should an adverse cost order be made against him;
- You must disclose to the client estimated costs it may recover or have to pay to the other party in relation to any settlement negotiations and this must be done in writing.

These are onerous requirements and practitioners should have in place procedures to ensure that these requirements are complied with.

PARTY AND PARTY ASSESSMENT

If you look at Section 353 of the Legal Profession Act and you will notice that the only cost that can be assessed are costs as a result of a order for the payment of an unspecified amount of costs made by a Court or a Tribunal.

Section 353 provides that an order made in criminal proceedings cannot be the subject of a party and party costs application, however, unlike the previous Legal Profession Act there is no provision in the 2004 Act to allow orders for assessment of costs to be made by the Land and Environment Court in criminal proceedings. The Land and Environment Court has attempted to get around this "log jam" by amending Part 16 Rule 5 of the Land and Environment Court Rules to allow the party having the advantage of the cost order to apply to the Proper Officer of the Supreme Court in accordance with Section 202 of the old Act for assessment of the whole of any party and party costs. The Rule goes onto provide that the costs are to be assessed in accordance with the provisions of the old Legal Profession Act, not the new.

The provision raises a number of interesting questions, including the following:

- 1 The ability of the Land and Environment Court by way of subsidiary legislation, namely the Rules, to amend the specific provisions of the 2004 Act.
- 2 The question of whether the Land and Environment Court Rules can legitimately incorporate the provisions of a repealed Act.
- 3 Whether Section 253 of the Criminal Procedures Act 1986 (being an Act that came into force before the Legal Profession Act 2004) can have the effect of imposing a requirement, by way of subsidiary legislation (Land and Environment Court Rules) giving the Supreme Court the right to assess costs in the circumstances when the later Act specifically provides that such an assessment cannot take place.

These interesting questions will no doubt be resolved over the next few years by litigation or amendment to the legislation.

As an applicant can only make an application for assessment of Party and Party costs if it has received costs as a result of an order for the payment of an unspecified amount of costs made by a Court or Tribunal. It is important that before an applicant commences the assessment process that it obtains a sealed copy of the order of the Court and forwards that with the application when it is filed with the Supreme Court.

There are some instances where an order may not be necessary. For instance pursuant to Part 52A Rule 14 of the Supreme Court Rules costs are payable by the discontinuing party from the discontinuance or deemed discontinuance of an appeal. On discontinuance there arises an automatic right to have costs assessed and a cost order is not necessary.

No formal order is required to discontinue proceedings in the Land and Environment Court, but as there is no automatic provision which provides that the discontinuing party is liable to pay the other party's costs. A Court order is therefore required before the assessment process can begin (Part 11 Rule 5 of the Land and Environment Court Rules).

In *Palerma –v- Liverpool City Council (2003) 124LGERA 83* the Court made it clear that discontinuance does not automatically entitle the non discontinuing party to costs. This case contains a useful discussion and the Court powers to award costs.

An application for Party and Party assessment is commenced by filing a form in accordance with Form 3 of the Regulations.

The filing fee is \$100.00 or 1% of the amount of costs remaining unpaid at the time that the application is made or 1% of the amount of costs in dispute at the time the application is made.

Where an applicant files a bill of costs in which partial objection is taken, the fees are not based on 1% of the amount to which no objection is taken, but the total amount of the bill.

When the application is filed the Supreme Court will refer it to an Assessor and if the Assessor believes that there is a conflict of interest, he is obliged to refuse the assignment and return the file to the Court.

The Assessor will normally check to see if the Court fees have been paid and that an order has been made, as without the payment of correct fees or without an order the Assessor has no jurisdiction to determine the matter.

An argument is often advanced that it is too difficult to obtain a sealed copy of an order if the order was made some time ago. Unfortunately in the absence of an order the Assessor cannot be satisfied that there is jurisdiction to determine the application. No matter how difficult it is, a sealed copy of an order, in my view, is essential to clothe the Assessor with jurisdiction. In order to ensure that applicants do not have difficulty in obtaining a sealed copy of the order at some later time (for instance because the tape has been destroyed or for other reasons relating to time lapse) I suggest that the successful party should immediately take out the orders and keep sealed copies of the orders on their file. Usually that is not a problem in the Land and Environment Court, as orders normally issue automatically. Parties should, however, check the orders to ensure that the parties shown in the orders are correct and that the order made is correctly set out. It is not unusual for parties to be misdescribed or for the sealed copies to contain other errors.

It should be remembered that generally an order made against multiple parties means that the parties are jointly and severally liable. If it is to be argued before the Cost Assessor that the costs should be paid equally by each party, then it is incumbent on the person raising such argument to show that the order as made by the Court correctly reflects that situation.

It should be remembered that it is no part of the Assessor's functions to read down the order or vary the order made by the Court.

If on the face of it the Court order is unambiguous and clear, there is no room for the Assessor to read that order down on the assumption that the Judge intends the order to be something other than what appears to be on the face of it. It is not unusual for parties to argue before the Assessor that an order "that the applicant pay the respondent's costs" should be interpreted in some limited manner so as to disallow certain costs. In the absence of such a limitation the Assessor is not entitled to read the order down. If it is intended the order to be read down or limited in some fashion, this argument should be run before the Judge and not before the Assessor. It is too late at the assessment stage to argue that an order should be read down or limited in some way.

When the Assessor receives the application he will normally forward a letter to each party advising them of their rights to make submissions under Section 359 of the Act and ask for various information from the cost applicant, including any fee disclosure or fee agreement between the successful applicant and its legal representatives.

Section 358 of the Legal Profession Act provides that the Cost Assessor may require certain documents and further particulars. It should be noted that the Cost Assessor may require such particulars to be verified by statutory declaration and a failure, without reasonable excuse, to comply with a notice under Section 358 can amount to professional misconduct and subject the defaulting party to a fine of up to \$5,500.00. This new provision allows enforcement proceedings to be taken against a non-practitioner applicant, as until this provision was inserted there was no penalty for a non-practitioner party failing to comply with directions to provide documents.

It is now usual for Assessors to require that applicants produce any costs agreement or relevant disclosure documents between the legal practitioner and the client. Section 365 of the Legal Profession Act gives the Assessor powers to have regard to a costs agreement, but prohibits the Assessor from applying the terms for the purpose of determining what is fair and reasonable costs.

Cost Assessors usually require production of the disclosure documents to satisfy themselves that costs are not being claimed in excess of those actually charged.

Sometimes obtaining this information from practitioners is harder than pulling teeth.

Sometimes Solicitors object to producing their disclosure documents on the grounds that there is some privilege attached to those documents. If you produce disclosure documents and wish to claim privilege in relation to them, you will take comfort from the decision of Master Malpas in *James Hardie & Coy Pty Ltd –v- Yeomans (delivered on 16 June 2000)* in which the Master upheld the decision of a Cost Assessor refusing to require a cost applicant to produce to the cost respondent the cost disclosure document that had been produced to the Assessor pursuant to Section 208H (the old Act).

Master Malpas took the view that as the documents were subject to a claim for privilege their production under Section 208H to the Assessor did not amount to a waiver of privilege, as the production was compulsory. This meant that although the applicant was required to produce those documents to the Assessor, the applicant was not entitled to have access to them.

Once the Costs Assessor receives all the relevant documents the Costs Assessors then proceeds to an assessment. The assessment is made pursuant to the Assessor's obligations under Section 364 to consider:

- (a) whether or not it was reasonable to carry out the work to which the costs relate;
- (b) whether or not the work was carried out in a reasonable manner; and
- (c) what is a fair and reasonable amount of costs for the work concerned.

Section 264(2) allows the Assessor to consider all or any of the following matters:

- (a) the skill, labour and responsibility displayed on the part of the [barrister](#) or [solicitor](#) responsible for the matter,
- (b) the complexity, novelty or difficulty of the matter,
- (c) the quality of the work done and whether the level of expertise was appropriate to the nature of the work done,
- (d) the place where and circumstances in which the [legal services](#) were provided,
- (e) the time within which the work was required to be done,
- (f) the outcome of the matter.

THE INDEMNITY PRINCIPLE

The Legal Profession Act does not contain the words "the indemnity principle", however it is important that you be aware that Party and Party costs are by way of indemnity to the successful party (*Gundary –v- Sainbury (1910) 1 KB 645*). Accordingly a party cannot recover in its application for Party and Party costs any amount in excess of that which it is liable to pay its legal practitioners.

If a party is entitled to a GST credit, that GST credit needs to be deducted before calculating the amount of costs that are recoverable from the cost respondent.

If the party is entitled to a discount, that discount needs to be fully disclosed to the Cost Assessor and needs to be applied on the application for Party and Party costs.

The practise of using Costs Consultants to draw bills may expose practitioners to substantial risk of professional misconduct. It is not unusual to see bills where an hourly rate is claimed well in excess of that specified in the Solicitor's retainer or in excess of that to which the party has been billed. It should be remembered that if the Assessor concludes that the charges are grossly excessive the matter must be referred to the Legal Services Commission. In other words there is no longer a discretion for the Assessor and the Assessor is compelled to refer any matter raising issues of professional misconduct or unsatisfactory conduct to the Legal Services Commission (see Section 393).

As the application for costs is signed by the practitioner, any practitioner who signs such an application containing misleading information runs a substantial risk of being referred to the Legal Services Commission for professional misconduct. In my view all practitioners have a duty not to mislead a decision maker by filing false or misleading information. practitioners

should be vigilant to ensure that bills drawn by Costs Consultants do not exaggerate the applicant's liability to pay costs to its Solicitors in any way, as otherwise there is a substantial risk that the Cost Assessor may refer their conduct to the Legal Services Commission.

In the *Commonwealth Bank of Australia –v- Hattersley & Another (2001) NSWSC60* the Court held that it is appropriate to treat an employed Lawyers on the same basis as an independent Lawyer and that a salaried Solicitor employed by a Corporation was entitled to recover costs on the ordinary basis as if he was not a salaried Lawyer and that the proper way of treating costs awarded in favour of a Corporation who employed a Solicitor was to allow an assessment on the same basis that one would have allowed had an independent Solicitor been engaged.

The fact that the successful applicant was a Corporation and legal work was performed on its behalf by a salaried practitioner, will not prevent costs being recovered on the same basis as if that Corporation had hired an independent Solicitor.

A practitioner cannot recover costs for typically pro bono work, even if a costs order is made in favour of the practitioner.

Litigants cannot recover any more costs than is payable to their Solicitors.

ASSESSING COSTS THAT ARE NOT THE SUBJECT OF AN OBJECTION

In *Turner –v- Pride (1999) NSW SC 850* Master Malpas held that a Cost Assessor was not limited to the assessment of only those items that are the subject of specific or general objections and said:

"The language of inter alia subdivision 3 does not justify the view that an absence of dispute (or objection) discharges or relieves the Cost Assessor of the obligation to comply with the relevant statutory requirements. The Regulations recognise that even where there is an agreement as to the amount a discretion is retained by the Cost Assessor (clause 26G)"

Accordingly a Cost Assessor is obliged to look at the whole of an itemised bill and apply the assessment process to all items.

Even when no objections are made, the Cost Assessor is required to consider each item and apply the test specified in Sections 364 of the Act.

SOME OTHER ISSUES

Cancellation Fees

I have never had it put to me that a Solicitor is entitled to a cancellation fee, however, on numerous occasions legal costs are claimed on the basis that a Barrister is entitled to a cancellation fee.

Most Cost Assessors will occasionally allow cancellation fees of Counsel to some small extent where they are satisfied that no other work could have been undertaken during that

time, that insufficient notice was given and after they have considered the nature of the proceedings and the time put aside.

In *Australian Federal Police –v- Razzi (1991) ALR425* Wilcox J held that there was presumption against an allowance for cancellation fees, however, it should be remembered that this was before the amendments to the Legal Profession Act.

It occurs to me that on a strict application of Section 364 of the Legal Profession Act there could be some argument as a matter of law that cancellation fees of Counsel are not recoverable on a Party and Party costs basis. The argument goes as follows:

- 1 Section 364 is mandatory and requires the Assessor to consider whether or not it was reasonable to carry out the work to which costs relate; and
- 2 What is a fair and reasonable amount of costs for the work concerned.

There is some argument that costs can only be allowed for work actually done. Where a practitioner has done nothing, other than set aside time in his diary for the doing of work, then it cannot reasonably be said any work was done and accordingly it is impossible for the Assessor to conclude that it was reasonable to carry the work or that the charge was a reasonable cost for the work when no work was ever done.

As cancellation fees are now a way of life with some sections of the Bar, I suggest that you consider your fee agreements with Counsels very carefully, as it is possible that sooner or later the Supreme Court or the Court of Appeal will be asked to consider the question of whether cancellation fees can lawfully be awarded on a Party and Party basis and it is conceivable that the Court will rule that as cancellation fees are in relation to work that was never performed the Assessor cannot have discharged his or her duty under Section 364 of the Legal Profession Act if cancellation fees are allowed.

Contingency Fee

This is another vexed question. Successful parties often seek indemnity for the contingency fee which may be up to 25% of the costs on a Party and Party assessment.

As a general rule Cost Assessors are disinclined to allow contingency fees on the basis that it is a bonus payable for success, rather than for the work. In *Madden –v- New South Wales Ministerial Corporation* Master Malpas approved a determination by a Cost Assessor declining to allow contingency fees and said:

"The exercise of determining whether the costs are unreasonable in the sense contemplated by the rule is a factual one. Each case is going to turn on its own particular facts."

Costs Consultant Fees

Generally most Assessors will allow reasonable fees for the use of a Costs Consultant, provided there is no double dipping. If for instance the Costs Consultant has been used to draw the Bill of Costs and all the Solicitor has done is sign the Bill of Costs, it would be unreasonable to allow a Solicitor fees for perusing that Bill of Costs, as it would be to allow

the Solicitor to peruse the Bill of Costs if he prepares his own document. The Cost Assessors will disallow this type double dipping.

Costs Consultants charge on the basis of a percentage of the Bill. Cost Assessors are required to consider the appropriateness of that charge pursuant to their functions under Section 364 and it is possible that sometimes the fee charged by the Costs Consultant will not be allowed in full.

It is sometimes argued that by virtue of Section 369 the costs of the parties in entering into the assessment process (ie drawing the bill of costs etc) cannot be recovered as Section 369 defines the costs of the assessment to only include the Cost Assessor's fees and the filing fee.

It is perfectly true that in a certificate issued under Section 369 an Assessor cannot include the costs of a party engaging in the assessment process, but in my view there is nothing preventing an Assessor from allowing a party to recover the costs of the assessment process and include those costs as part of the costs payable in the party and party costs certificate under Section 368.

Hourly Rate

There is no scale, other than in Probate, Workers Compensation and Motor Accident matters.

It is now a matter for each Cost Assessor to determine the appropriate rate. Cost Assessors discuss rates at their annual conference and do have the benefit of some relevant research, but do not apply any fixed hourly rate across the board, as they are obliged to determine the rate on an individual basis.

The question of hourly charges is of course subject to considerable discussion in the media and the profession. Most Cost Assessors do not apply the hourly rate across the board when assessing Party and Party matters. They look at the cost of the service provided and whether the charge is reasonable.

For instance, an Accredited Specialist may be entitled to charge a higher hourly rate because of his or her expertise, however, one would expect that higher hourly rates to be off-set by less use of Counsel and by less time being spent on complicated matters. If an Accredited Specialist charged a higher hourly rate and does a task in the same amount of the time as if it was done by a junior Solicitor, then you can expect that their fee for that service will be reduced accordingly.

Facsimiles and Photocopying

Facsimiles will normally only be allowed when they are required because of some urgent factor. If facsimiles are used simply because the Solicitor has been tardy, the charges of sending the facsimiles will not normally be allowed.

There is a tendency to disallow or only allow a small amount for facsimiles received.

Facsimiles will now only be allowed at a much reduced rates and the day of the \$5.00 per facsimile has well and truly gone.

Similarly in relation to photocopying, generally Assessors will allow a margin of around about 50¢ to \$1.00 for small numbers of copies and for larger numbers exceeding 20 pages or more, a commercial rate is applied normally in the region of 20¢ and 30¢. Sometimes Assessors will take into account the fact that in some country areas commercial photocopying facilities are not available and will allow a higher rate if it is shown to be reasonable to do so.

Description of Work

When drawing your bill you should give as comprehensive a description of the work as possible. The process is intended to be a paper driven process and the Assessor must consider whether the service provided was reasonably necessary and whether the cost claimed is fair and reasonable.

A cryptic description such as "telephone attendance upon client" without indicating what was the subject of discussion will probably lead in that item be disallowed or substantially reduced.

Reading Time and Research

Reasonable research will normally be allowed, however, this would depend on the degree of complexity of the case and the skill of the legal practitioner. Assessors will not allow practitioners to use the case to finance their own legal education.

If you have already argued that a higher rate should be payable because of the Solicitor's particular skill then the converse applies that skill should result in a cost benefit of less research and less time spent on particular items of work.

Running Briefs

A Solicitor who is merely a conduit between the client or the other party and Counsel will not normally be allowed continuous allowances for forwarding documents to Counsel.

The Cost of the Assessment Process and Assessment Fees Paid to the Court

Under Section 369 the Assessor has jurisdiction to order the party to pay the costs of the assessment. The cost of the assessment is limited to the filing fee and the Cost Assessor's fee. The procedure that is now used is that the certificate under Section 368 (setting out the party and party costs) and the certificate under Section 369 (setting who is to pay the costs of the cost assessment) is forwarded to the Supreme Court and a letter is forwarded to the parties advising that on payment of the Cost Assessor's fees (by either party) the certificates will be forwarded to the parties by the Court.

The problem with this procedure, as I see it, is that usually the cost respondent is ordered to pay the Cost Assessor's costs, but there will be no incentive for the respondent to do so to enable the certificate to issue and the likelihood is that those fees will have to be paid by the applicant.

I am told that the reason for this change is that the Supreme Court have un-recovered arrears of Cost Assessors' fees amounting to almost \$3,000,000.00 and the Court found it very difficult to recover these costs from reluctant and sometimes impecunious respondents.

Nonetheless the fact remains that the new procedures will put an onerous burden on the applicants (who will really be only interested party, as until the certificate is issued the applicant can't recover the costs) to pay the costs of cost assessment and then have to chase the respondent for these costs.

There is further problem in relation to recovery of these costs, in that there is no clear cut method to allow the applicant to enforce the cost certificate issued under Section 369. Section 369(8) provides that the costs of the Cost Assessor are to be paid to the Manager of Cost Assessment. Section 369(7) provides that the filing of the certificate in a Court Registry is to be taken a judgment of the Court for the unpaid costs. The problem is that the unpaid costs of the cost assessor are to be paid to the Manager of Cost Assessment and there is no provision for the applicant who has paid those costs to recover the costs themselves. I am told that the intention is that the Supreme Court will be assigning its right to recover costs under Section 369(9) to the applicant, but one needs to query whether the Court has the power to do so.

Settlement

Cost Assessors have an obligation to deal with matters referred to them quickly and efficiently. In the event you are entering into settlement negotiations you should advise the Cost Assessor immediately and obtain an assessment of costs of the Cost Assessor incurred to date.

The Cost Assessor will normally allow a period of 1 or 2 weeks to enable settlement negotiations to take place, but will not delay the assessment process indefinitely.

If the matter is settled the parties have two choices and they are as follows:

- 1 To settle the matter between them and simply advise the Cost Assessor that the matter has been settled and advise the Cost Assessor who is to pay the Cost Assessor's fees;
or
- 2 alternately they can ask the Cost Assessor to issue a formal Certificate of the assessment and also advise the Cost Assessor of who is pay the Cost Assessor's fees.

It is important (regardless of how the matter is settled) that the Cost Assessor is advised as to who is to pay the fees of the cost assessment, as the Cost Assessor must issue a certificate specifying who is liable to pay these fees, which of course include the fees of the Cost Assessor.

When the Cost Assessor issues such Certificate, the Cost Assessor's fees are not payable to the Cost Assessor but in fact are payable to the Proper Officer of the Supreme Court. The Cost Assessor is in turn paid by the Supreme Court.

Interest

Generally in Party and Party costs the Cost Assessor has no power to award interest. It should be remembered that in Land and Environment Court matters interest accrues on the cost order from the date of the cost order pursuant to Section 69A of the Land and Environment Court Act.

In the *Minister Administering the Environmental Planning and Assessment Act –v- Carson (1994) 35 NSWLR 342* the Court of Appeal held that interest on a cost order made by the Land and Environment Court ran from the date of the Court order and not from the date of the Certificate of Taxation.

The Court of Appeal indicated that in circumstances of substantial delay by the cost applicant the cost respondent may justifiably apply for an order that interest not run from the date the Court order take effects, but otherwise it could be expected that interest will run from the date of the order. This is of particular importance if you are acting for a costs respondent. The Court's interest rates are high and there could be some incentive for an applicant to delay filing its bill of costs. In those circumstances it should be remembered that you do have a right on behalf of the respondent to apply to the Land and Environment Court for a variation of the orders, so as to provide that interest is not to run from a certain period of time.

In the absence of such an order from the Land and Environment Court the successful cost applicant is entitled not only to the amount of costs specified in the costs certificate, but interest on that costs from the date of the order.

Reserved Costs

Until amendments to the *Civil Procedures Act* it was generally the rule that if costs were reserved they were not recoverable unless specific later orders provided for payment of those costs. Amendments to the *Civil Procedures Act* now provide that reserved costs are incorporated in the final cost order, however, as the *Civil Procedure Act* does not currently apply to the Land and Environment Court, it would be prudent when the matter is completed to ask the Court to deal with the question of reserved costs so that any subsequent cost order specifically includes reserved costs.

Some Traps for Young Players

- When you have two cost orders, such as one in the Land and Environment Court and another in the Court of Appeal it would be prudent to file two separate applications for costs, so that two separate certificates issue in respect of each proceedings. This is because costs in the Land and Environment Court bear interest from the date of the cost order, whereas costs in most other Courts do not bear interest until such time as the certificate is filed with the Court.
- Read the bill carefully before you sign it to ensure that the grossly excessive claims for costs are not contained in your bill, as otherwise you could become the victim of the cost consultant's exaggeration.
- People who draw bills of costs are cost consultants not cost assessors.
- Make sure you when you are serving a solicitor and client bill on your client that a notification of the client's rights under Section 333 is included in the bill.
- Interim bills are a good idea, but be aware that by rendering that the time for a client to challenge the bill is extended to when a final bill is rendered (see Section 334(2)).
- At the end of the proceedings of the Land and Environment Court seek a determination from the Court as to who is to pay reserved costs, rather than relying on the Civil Procedures Act.
- When settling a matter for the client in the Land and Environment Court (be it in relation to any proceedings including Class 1 proceedings) it would be prudent to make disclosure under Section 313 disclosing your anticipated costs to date and the

other party's costs that may be payable. I believe that in the future respondents to party and party cost applications will be calling for these documents and you should make every attempt to ensure that this disclosure is as accurate as possible.